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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TRUCK DRIVERS LOCAL UNION NO. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A.F.L.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on March 13, 1956, setting aside the Board's order dismissing the complaint issued upon a charge filed by Truck Drivers Local Union No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., herein called the Union, and remanding the case to the Board for further proceedings.

OPINIONS BELOW

The opinion of the court below (App. A, *infra*, pp. 17-40) is not yet reported. The findings of fact, conclusions of law, and order of the Board (R. 22-32, 38-41)[1] are reported at 109 NLRB 447.

JURISDICTION

The judgment of the court below was entered on March 13, 1956 (App. A, *infra*, pp. 40-41). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Where employers bargain jointly, in a multi-employer association, with the union representing their employees, and the union supports its bargaining demands by a strike against one employer in the group, are the other employers, threatened by successive and separate strikes against themselves, permitted under the National Labor Relations Act to close their plants until the strike is terminated?

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), appear in Appendix B, *infra*, pp. 41-42.

STATEMENT

1. *The facts.*—For a period of thirteen years the eight linen supply companies located in the

[1] References designated "R" are to the Joint Appendix to the briefs in the court below.

cities of Buffalo, Niagara Falls and Dunkirk, New York, have bargained as a group with the Union, which represents the truck drivers of all eight companies (R. 39; 16). It has been customary for the Union to negotiate contracts of uniform application to all the companies at regular intervals with the association of which the employers are members, the Linen and Credit Exchange, following which such contracts are approved and signed by each company (*ibid.*).

In the spring of 1953, when negotiations between the Exchange and the Union for a new contract failed to bring agreement, the Union struck Frontier Linen Supply Co., one of the members of the Exchange (R. 39; 17-18). A picket line was established at Frontier's plant only, and the Union members continued to work at the remaining seven companies (R. 39; 18). On the day following the strike at Frontier, however, the non-struck members of the Exchange laid off their employees and notified the Union that operations would not be resumed until the strike at Frontier was terminated *(ibid.)*. About a week later, following continued negotiations between the Exchange and the Union, a new contract, uniformly applicable to all members of the Exchange, was executed (R. 39; 20). Thereupon, the strike was called off, the non-struck employers recalled their employees to work, and all eight companies once again began normal operations (*ibid.*).

2. *The Board's decision.*—Upon the foregoing facts, the Board, Member Murdock dissenting,

found that the non-struck employers were entitled to shut down their operations during the strike against Frontier, and therefore dismissed the complaint which charged that they had committed an unfair labor practice in violation of Section 8(a)(3) and (1) of the Act by thus laying off their employees (R. 41). As a factual premise for its determination, the Board found that, in view of the established practice of negotiating a contract uniformly applicable to all members of the Exchange, the strike against Frontier was in support of demands which were common as to all eight companies, and thus "necessarily carried with it an implicit threat of future strike action against any or all of the other members of the [Exchange]" (R. 40). The tactic of waging separate and successive strikes against the several employer members of a multi-employer bargaining unit was considered by the Board to be an exertion of "economic pressure to atomize the employer solidarity which is the fundamental aim of the multi-employer bargaining relationship" (R. 40). The Board concluded that the employers, in order to defend their interests in the multi-employer bargaining unit which the threat of successive strikes endangered, "and in the absence of any independent evidence of antiunion motivation," were privileged to shut down their operations during the strike against one of their number (R. 40-41).[2]

[2] The Board found it unnecessary upon the facts of this case to pass upon the issue whether an employer lockout is a corol-

3. *The decision of the Court of Appeals.*—The Court of Appeals affirmed the Board's finding that in the circumstances the strike against Frontier implied that successive strikes would be waged against the remaining members of the Exchange, but, with Judge Waterman dissenting, rejected the Board's conclusion that the non-struck members of the Exchange acted lawfully when they laid off their employees. Accordingly, the court set aside the Board's order dismissing the complaint and remanded the case to the Board for further proceedings.

Noting in its opinion that ordinarily "an employer who locks out its employees on mere threat of, or in anticipation of, a strike is guilty of an unfair labor practice" (App. A, *infra*, p. 21), the court below found no special considerations warranting a departure from that rule in a multi-employer bargaining relationship where the union undertakes to initiate a series of separate strikes against the employers. It reasoned that the Union's strike in this case constituted in effect a "withdraw[al] from multi-employer bargaining,"

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lary of the employees' statutory right to strike. It stated (R. 41):

> We have done no more in this case than affirm the legal concept enunciated by the Ninth Circuit Court of Appeals in the *Davis Furniture* case [205 F.2d 355] which provides that a strike by employees against one employer-member of a multi-employer bargaining unit constitutes a threat of strike action against the other employers, which threat, *per se*, constitutes the type of economic or operative problem at the plants of the non-struck employers which legally justifies their resort to a temporary lockout of employees. [Footnote omitted]

and declared that this course of action was open to the Union under the Act in view of Board holdings to the effect that an employer is entitled to discontinue at will participation in group bargaining.

Answering the contention that the strike constituted a direct assault on "the employer solidarity which is the fundamental aim of the multi-employer bargaining relationship" (R. 40), and that the non-struck employers were entitled to protect that interest, the court stated (App. A, *infra*, pp. 31-33):

> Multi-employer bargaining has never received the express sanction of Congress. It would stretch the usual canons of interpretation unduly far to conclude that, in enacting the Taft-Hartley Act, Congress gave legislative approval to all the previous Board rulings concerning such bargaining. Even if we assume that it did, still the Board at that time had not gone to the extreme lengths to which it now seeks to go in order to maintain the "stability of the employer unit."
>
> * * * * *
>
> We feel the Board's action in restricting employees in the exercise of rights which Congress has expressly protected, merely to effectuate a policy as to which Congress has, as yet, expressed no clear opinion, constitutes an abuse of the Board's legitimate authority under the Act and a usurpation of the power of Con-

> gress. Neither the Board nor the courts may make so fundamental a change in the existing law as that which would result from the Board's decision. [Footnotes omitted]

In reaching this conclusion the court expressly disagreed with the decision of the Ninth Circuit in *Davis Furniture* v. *National Labor Relations Board*, 197 F. 2d 435, 205 F. 2d 355, which the Board followed in this case.[3] In addition, the court observed that both the Seventh [4] and Eighth [5] Cir-

[3] In *Davis Furniture*, the Ninth Circuit rejected the Board's original position on the question here presented, that the Act forbade employer lockouts in defense against piecemeal strike tactics in a multi-employer bargaining relationship. When the present case came before it, the Board reconsidered its earlier views, and concluded that it should "affirm the legal concept enunciated by the Ninth Circuit . . . in the *Davis Furniture* case" (R. 41).

[4] In *Morand Bros. Beverage Co.* v. *National Labor Relations Board*, 190 F. 2d 576 (C.A. 7), the Seventh Circuit held, in conformity with the Board's position in this case, that the non-struck employers in a multi-employer bargaining relationship were entitled to impose a lockout when one of them was struck in support of common contract demands. The case was remanded to the Board, however, for findings on the question of whether the employees in that case had been permanently discharged rather than temporarily locked out, a difference which was critical to the Seventh Circuit's decision in view of the settled law "that an employer's discharge of his employees because of their . . . strike activity . . . is an unfair labor practice" (190 F. 2d at 583). In subsequent proceedings the Board's order against the employers was enforced by the Seventh Circuit upon its affirmance of the Board's findings, made on remand, that the employees had been discharged. 204 F. 2d 529, certiorari denied, 346 U.S. 909.

[5] In *National Labor Relations Board* v. *Continental Baking Co.*, 221 F. 2d 427, and *National Labor Relations Board* v. *Spalding Avery Lumber Co.*, 220 F. 2d 673, the Eighth Cir-

cuits "have expressed views similar to those of the Ninth Circuit" (App. A, *infra*, p. 22).

REASONS FOR GRANTING THE WRIT

1. As the court below has made explicit, its decision is in conflict with that of the Ninth Circuit in *Davis Furniture* v. *National Labor Relations Board, supra,* 197 F. 2d 435, 205 F. 2d 355. In both cases the non-struck employers in a multi-employer bargaining unit closed down operations when the union with which they bargained struck one of their number and threatened successive strikes against the remainder in support of common contract demands. In the *Davis Furniture* case, this "whipsawing" tactic was openly announced by the union (197 F. 2d at 437); here, the court affirmed the Board's conclusion of fact that the threat of piecemeal strikes against the members of the Exchange was implicit in the strike against Frontier (App. A, *infra,* p. 20). Similarly, it was established in both cases that the employers did not act in reprisal against their employees for resorting to the threat of strike activity: in *Davis Furniture,* a Board finding of improper motivation was reversed by the Ninth Circuit for want of supporting

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cuit rejected the Board's factual findings that the employers in those cases had locked out their employees for the purpose of discouraging strike activity rather than for defensive reasons, and denied enforcement of the Board's orders. In those cases, as here, a union had struck one employer in a multi-employer bargaining unit, and the remainder had thereupon shut down operations. The opinions in those cases indicate approval of the Ninth Circuit's decision in *Davis Furniture, supra.*

evidence (197 F. 2d at 437), and in this case the court did not disturb the Board's finding of an "absence of any independent evidence of anti-union motivation" (R. 40). Accordingly, the question of law in both cases is identical:—whether the Act permits the non-struck employers to close down in defense against such whipsawing tactics, so long as the strike against one of the employers in the unit continues. The Ninth Circuit in the *Davis* case answered this question in the affirmative. The court below expressly rejected both the reasoning and conclusion of the Ninth Circuit and held that such a lockout constitutes a violation of the Act.

In addition, the decision in this case conflicts with decisions of the Seventh and Eighth Circuits. Contrary to the observation of the court below, that the views of these courts were expressed in "dicta" (App. A, *infra*, p. 22; n. 5), we believe that the holdings in the cases in question rest on the entitlement of employers to suspend operations in the same factual context as the one in this case. Thus, in *National Labor Relations Board* v. *Morand Brothers, supra*, 190 F. 2d 576 (C.A. 7), the remand to the Board to make findings as to whether the employees were permanently discharged (*supra*, p. 7, n. 4) was occasioned by the ruling of the Seventh Circuit in that case that the employers could lawfully impose a temporary lockout. Similarly, denial of enforcement of the Board's orders by the Eighth Circuit in *National Labor Relations Board* v. *Continental Baking Co., supra*, 221 F. 2d 427, and *National Labor Relations Board*

v. *Spalding Avery Lumber Co., supra,* 220 F. 2d 673, upon rejection of the Board's factual findings that the lockouts by the non-struck employers in those cases were improperly motivated, is consistent only with the holding that, absent such improper motivation, the employers could lawfully act as they did. Accordingly, there is, we submit, square conflict between the Seventh, Eighth and Ninth Circuits, on the one hand, and the court below, on the other, with respect to the question presented in this case.

2. Resolution of the question presented is of manifest practical importance in increasingly large numbers of bargaining relationships. According to information furnished by the Bureau of Labor Statistics, but not as yet published, there were, as of January 1956, approximately 4 million employees out of a total of 9 million covered in a survey made by the Bureau working under contracts executed by multi-employer associations. See also BLS Report No. 1 (Gov't Printing Office, 1953); Monthly Labor Review, Bureau of Labor Statistics, Vol. 64, pp. 398, 409 (Gov't Print. Off., 1947).

The evolution and practice of group bargaining among competing employers whose employees are represented by a single union may largely be explained in terms of an effort by employers to standardize employment conditions in their plants, and to avoid, by the kind of concerted action resorted to in this case, the divisive and harmful effect of

whipsawing.[6] By engaging in piecemeal strikes within a multi-employer unit, a union makes a direct assault on "the employer solidarity which is the fundamental aim of the multi-employer bargaining relationship" (R. 40). If the ruling below is correct, one of the principal reasons for the formation of such units will have disappeared. More than that, if the non-struck employers cannot suspend operations in order to defend against such whipsawing, the "unit power of collective bargaining would be impaired and ultimately the organization itself destroyed." *Davis Furniture* v. *National Labor Relations Board,* 197 F. 2d 435, 437 (C.A. 9). Accordingly, intelligent utilization, and perhaps even the continued existence, of this practice may depend in large measure on a clear understanding by the parties as to whether piecemeal

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[6] See, *e.g.*, Freiden, *The Taft-Hartley Act and Multi-Employer Bargaining* (Univ. of Pennsylvania Press, 1948), p. 5; Garrett and Tripp, *Management Problems Implicit in Multi-Employer Bargaining* (Univ. of Pennsylvania Press, 1949), pp. 2-3; Kerr and Fisher, *Multiple Employer Bargaining: The San Francisco Experience* (Univ. of California Press, 1948), pp. 27-30; Hall, *Impact of the Bargaining Unit on Labor Management Relations* (Second Annual Conference on Labor, N.Y.U., 1949), pp. 29, 39-40. As stated by the Court of Appeals for the Ninth Circuit, "Congress, in permitting small employers to strengthen their positions by joining multi-employer associations, undoubtedly had in mind the power of large unions to coerce these less financially able small employers." *Davis Furniture Co.* v. *National Labor Relations Board*, 197 F. 2d 435, 438.

As noted in the dissenting opinion in the court below, group bargaining also presents attractive features to unions, and has generally resulted in less frequent strikes (App. A, *infra*, p. 36).

strike action may be met with a concerted shutdown by the employers in such a unit.

3. The major premise of the decision of the court below—that whipsawing amounts in legal effect to a withdrawal by the union from the multi-employer unit (*supra*, p. 29)—misconceives the nature of the strike tactic resorted to by the Union in this case.[7] As observed in the dissenting opinion, the Union did not seek to withdraw from the unit; it continued to bargain with the Exchange for a unit-wide contract as before (App. A, *infra*, p. 38, n. 7). This, indeed, is the usual pattern, for the goal of whipsawing is accession by all employers in the unit to uniform contract terms which the striking union first seeks through negotiation in the multi-employer unit. Whipsawing thus represents an effort to retain the advantage and structure of the multi-employer unit and simultaneously to destroy, by a divide-and-conquer strategy, the employers' unity of position.

For these reasons, the question which the court

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[7] The Board has held that where multi-employer bargaining has in fact come to an end, a strike against a single employer to obtain a contract with him alone does not justify a lockout by the remaining employers in the former unit. *Spalding Avery Lumber Co.*, 103 NLRB 1516. The difference in this case between the Board's position and that of the court below, however, is not merely as to whether the facts show a valid withdrawal from the multi-employer unit. The court below construes the piecemeal strike technique to constitute, as a matter of law, a termination of multi-employer bargaining and of any interest therein which employers might legitimately protect by appropriate action. This view rejects the principle of statutory accommodation which the Board believes to be applicable in this situation.

below thought controlling here—whether the Union was entitled in the circumstances of this case to withdraw from the multi-employer unit—is not germane to decision in this case.[8] Nor does the fact that the suspension of operations by the non-struck members of the Exchange interfered with the Union's protected right to engage in strike activity provide a dispositive answer. For, as the dissenting opinion points out, "Not every employer interference with a legitimate concerted activity is proscribed by the Act" (App. A, p. 34). See *National Labor Relations Board* v. *Mackay,* 304 U.S. 333; *National Labor Relations Board* v. *Babcock and Wilcox Company,* decided April 30, 1956, 24 L.W. 4229. Rather, the propriety of employer action to combat whip-sawing turns on the extent to which the Act recognizes and accommodates an employer interest in multi-employer bargaining.

In concluding that the Act affords employers no defensible interest in multi-employer bargaining because the practice "has never received the ex-

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[8] Accordingly, neither the correctness of Board rulings, with which the court below expresses disagreement, relating to the right of unions to terminate a multi-employer bargaining relationship, nor the appropriateness of the multi-employer unit in which the Union has bargained, may properly be regarded as issues in this case. It may be noted, however, that one of the reasons given by the court below for avoiding decision as to the appropriateness of the multi-employer unit—that the parties had reached an impasse in bargaining which entitled the Union to discontinue bargaining in that unit—rests on an apparent misreading of the trial examiner's findings. Contrary to the court's statement (App. A, *infra,* p. 28, n. 10), the trial examiner found that an impasse was "absent here so far as the record shows" (R. 28).

press sanction of Congress," the court below overlooked both the important role played by such units in bargaining relationships established under the provisions of the Act and the recognition given them by Congress in enacting the 1947 amendments to the Act. Thus, from the earliest years under the Wagner Act, the Board has established multi-employer units, and they have proved efficacious in lessening industrial strife and benefiting the parties thereto. *Supra*, p. 11. As the court below concedes (App. A, infra, p. 31, n. 13), Congress, in 1947, evidenced its intention not "to interfere with [this] practice. . . ." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 46-47, 1 *Legislative History of the Labor Management Relations Act, 1947*, 550-551 (Gov't Print. Off. 1948).

In defending themselves against the divisive pressures of whipsawing, the non-struck employers in this case acted to preserve a bargaining relationship in which they had a legitimate and established interest. The course they followed did no more than implement the theory of multi-employer bargaining by treating a strike against one of their number, to enforce demands against all, as a strike against all. The temporary shutdown wrought no permanent penalty for striking, but simply permitted the Union's resort to its economic strength to be met by the same forces as those involved in the contractual negotiations which preceded the strike. Accordingly, we believe the court below erred in not accepting as reasonable and valid the accommodation worked out by the Board between

the competing interests of the Union in striking and of the employers in preserving the integrity of the unit.[9]

[9] Overlooking the special problems relating to the multi-employer unit, as distinguished from the case of a lockout by a single employer, the court below emphasized that the Board "concedes, as it must, the basic principle that an employer who locks out its employees on mere threat of, or in anticipation of, a strike is guilty of an unfair labor practice" (App. A., infra, p. 21). As noted above (p. 4, n. 2), the Board expressly stated that upon the facts of this case it was unnecessary to pass upon that issue. Prior Board decisions have recognized that a suspension of operations by an individual employer is permissible in anticipation of a strike where the employer's action is prompted by a purpose to avoid serious prospective economic loss or business disruption that a strike might bring about. See *e.g.*, *Duluth Bottling Association*, 48 NLRB 1335, 1359-1360; *International Shoe Co.*, 93 NLRB 907; *Betts Cadillac Olds, Inc.*, 96 NLRB 268. Where, however, a lockout is prompted by a punitive or discriminatory purpose, the Board has found it to be violative of the Act. *Somerset Classics, Inc.*, 90 NLRB 1676, enforced 193 F. 2d 613 (C.A. 2), certiorari denied, 344 U.S. 816.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

THEOPHIL C. KAMMHOLZ,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
DOMINICK L. MANOLI,
Assistant General Counsel,
DUANE BEESON,
Attorney,
National Labor Relations Board.

MAY, 1956.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 86—October Term, 1955

Docket No. 23424

Argued October 14, 1955 Decided February 14, 1956.

TRUCK DRIVERS LOCAL UNION NO. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. OF L., PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

Before:

CLARK, FRANK and WATERMAN, CIRCUIT JUDGES.

Petition to review and set aside an order of the National Labor Relations Board. GRANTED.

FRANK, *Circuit Judge:*

Truck Drivers Local Union No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L. (hereinafter referred to as the Union) seeks review under § 10 of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C. §151 *et seq.*) (hereinafter referred to as the Act) of an order of the National Labor Relations Board, dismissing an unfair-labor-practices complaint in which it is the charging party. The Union asks,

that the order of the Board be set aside. The decision of the Board is reported at 109 N. L. R. B. 447.

The case was tried on an agreed state of facts which are substantially as follows:

The Union represents all the truck-driver employees of the members of the Linen and Credit Exchange (hereinafter called the Exchange), an employer association representing eight employers in collective bargaining negotiations with the Union. However, it does not appear from the stipulated facts that the Union has been certified by the Board as bargaining agent for the association-wide unit. The terms of the agreements were worked out by the representatives of Exchange and the Union, and then submitted to the membership of Exchange and the Union for majority approval. When majority approval was given, the agreement was signed by each member of Exchange and by the Union. This had been the practice for the thirteen years preceding this controversy.

Sixty days before April 30, 1953, when the contract (which contained an automatic renewal clause requiring notice of a desire to change the contract to be given sixty days before the expiration date) was to expire, the Union notified Exchange of its desire to open negotiations to change the agreement. In March, 1953, negotiations were begun for a new collective bargaining agreement. Meetings were held during the succeeding weeks but no agreement was reached. On May 26, 1953, the truck-driver employees of Frontier Linen Supply,

Inc., a member of Exchange, went on strike, but the employees of the other seven members remained on the job.

On the evening that the strike against Frontier began, Exchange notified the Union that the other members were laying off all their truck-driver employees until the strike at Frontier was ended. A lockout by these seven members of Exchange followed; at the succeeding negotiations, the Union was told that the employees of all such members would be recalled to work if the picket-line at Frontier were withdrawn and the strike terminated.

On June 3, 1953, agreement was reached on a new contract which was uniformly applicable to all members of Exchange, including Frontier. Both the strike and the lockout were then terminated, and the employees of all the members returned to work. The Union thereupon filed a complaint with the Board charging Exchange, and the seven members who had locked out their employees, with unfair-labor practices in violation of §8(a)(3) and (1) of the Labor Management Relations Act of 1947. The Board overruled the determination of the trial examiner that these employers had engaged in unfair labor practices by locking out the non-striking employees, and dismissed the complaint. The Board held that the strike against Frontier constituted a threat of a strike against all the other members of Exchange and that the non-struck members were justified in locking out their employees until the strike against Frontier ended.

The Union contends that there was no evidence

of a threat of a strike against the employers other than Frontier. We think, however, that the Board reasonably inferred such a threat. For previously the Union had conducted its negotiations with Exchange, but here, during such negotiations, it began a strike against Frontier, one member of the Exchange, although there was no peculiar facts concerning the Union's relations with that single member.

We come then to the question at the heart of the case, i.e., whether the threat of a strike legalized the lockouts by those employers against whom no strike had been called.

No provision of the L. M. R. A. of 1947, by its terms, generally specifically prohibits or authorizes lockouts by employers; and the Board, in its opinion, states that it does not hold that the employer's right to lock out its employees is the corollary of the employees' statutory right to strike. In addition, § 7 of the Act guarantees employees the right to engage in "concerted activities" for "their mutual aid or protection"; and it has been held that the right to strike and to support a strike constitutes "concerted activity" which is protected by the statute.[1] Interference with this right by the employer constitutes an unfair labor practice under §8(c)(1) of the Act, and a lockout prompted by a purpose to defeat employee organization or otherwise protected concerted activities is violative

[1] *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America* v. *WERB*, 340 U. S. 383, 389-390; *International Union of Automobile, etc. Workers of America, C. I. O.* v. *O'Brien*, 339 U. S. 454, 456-457; *N. L. R. B.* v. *Fansteel Mettallurgical Corp.*, 306 U. S. 240, 255-256.

of the Act.[2] Such a lockout would also violate §8 (a)(3) of the Act.[3]

The Board, in its brief, concedes, as it must, the basic principle that an employer who locks out its employees on mere threat of, or in anticipation of, a strike is guilty of an unfair labor practice. Up to the time of the decision in the instant case, the Board has held that only in unusual cases of economic hardship is an employer justified in locking out its employees when faced with a threatened strike. Thus, it has held that an employer may close down operations where (1) a spoilage of materials would otherwise result, *Duluth Bottling Association,* 48 N. L. R. B. 1335, 1336, 1359-60; (2) the prospective work stoppage in one of several integrated departments threatens to be of a recurrent nature so that it is difficult for the employer to plan production, *International Shoe Company,* 93 N. L. R. B. 907; or (3) the Union's refusal to give assurance of sufficient advance notice to allow repair work in progress to be finished and returned to customers, renders it economically imprudent for the employer to con-

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[2] *N. L. R. B.* v. *Wallick & Schwaler Co.,* 198 F. (2d) 477 (C. A. 3); *N. L. R. B.* v. *Somerset Classics,* 193 F. (2d) 613 (C. A. 2), cert. den. 344 U. S. 816; *Olin Industries* v. *N. L. R. B.,* 191 F. (2d) 613 (C. A. 5), cert. den. 343 U. S. 919. See also Koretz, Legality of the Lockout, 4 Syracuse L. Rev. 251, 253-254 (1953); Note 3 Stanford L. Rev. 510, 517 (1951).

[3] *Associated Press* v. *N. L. R. B.,* 301 U. S. 103; *N. L. R. B.* v. *Schwaler Co.,* 198 F. (2d) 477 (C. A. 3); *N. L. R. B.* v. *Somerset Classics,* 193 F. (2d) 613 (C. A. 2), cert. den. 344 U. S. 816; *Morand Bros. Beverage Co.,* 99 N. L. R. B. 1448, 1460-1466 (on remand).

tinue operations, *Betts Cadillac Olds, Inc.*, 96 N. L. R. B. 268.[4]

The Board also concedes in its brief that, "prior to this case, a majority of the Board had interpreted the Act as precluding the non-struck members of an employer unit from utilizing a lockout." See *Morand Bros. Beverage Co.*, 99 N. L. R. B. 1448 (on remand); *Davis Furniture Company*, 94 N. L. R. B. 279, 100 N. L. R. B. 1016 (on remand). In the instant case, the Board departed from its previous position by adopting the position of the Ninth Circuit in *Leonard* v. *N. L. R. B.*, 197 F. (2d) 435, 205 F. (2d) 335 (C. A. 9).[5]

In its second opinion in the *Leonard* case, 205 F. (2d) 355 (C. A. 9), which the Board cited in its opinion here, the Ninth Circuit apparently felt that "whipsawing" (calling a strike against one employer, in a multi-employer unit, at a time) caused economic and operational difficulties such as justified a lockout in cases like *Duluth Bottling Association, supra.* The court stated at 205 F. (2d) 255, 256:

> "The effect of such a recurrent whipsawing process is obvious. No one of the ten remain-

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[4] See also *Associated General Contractors*, 105 N. L. R. B. 767.

The Trial Examiner found that "* * * there was no showing that there were any economic considerations which justified the lockout, and none that the respondents' motive was in fact the protection of their economic interests." *Buffalo Linen Supply Co.*, 109 N. L. R. B. 447, 454.

[5] Other circuits, in dicta, have expressed views similar to those of the Ninth Circuit. *N. L. R. B.* v. *Continental Baking Co.*, 221 F. (2d) 427, 431-432 (C. A. 8); *N. L. R. B.* v. *Spalding Avery Lumber Co.*, 220 F. (2d) 673 (C. A. 8); *N. L. R. B.* v. *Morand*, 190 F. (2d) 576, 582 (C. A. 7).

ing dealers could know whether or not its store was next to have its employees sawed off in the continued whipping. Hence none could feel it safe to take orders from its customers which they would be embarrassed by non-deliveries to them. Likewise, no dealer was safe in placing orders for furniture with the manufacturers which might well find no employees to unload it in their stores or if so delivered to the stores it would lie as depreciating overstocked inventories."

We think this reasoning of the Ninth Circuit erroneous. The court's rationale would apply as well to cases involving only a single employer threatened with a strike. For he, too, would be faced with the prospect of disappointing his customers or being left with large depreciating inventories. Yet the Board correctly admits that he would not be justified in locking out his employees when they threaten to strike.

The Ninth Circuit also reasoned that its decision was necessary because a strike against any one member of an association would find that member too weak economically to stand up under a strike. We seriously doubt whether mere proof of such weakness of an employer, when threatened with a strike, justifies him in utilizing a lockout. But we need not here consider that question. For there is no proof here, and no finding, that any of the employers who locked out was thus economically weak. On the contrary, according to the stipulated facts, the sole reason for the lockouts was the strike against a single member of the association and a desire to end that strike.

The Ninth Circuit regarded as significant the linking of the term "strike and lockout" in the statute, and on that basis concluded that Congress recognizes the two as correlative economic powers. But we think the Board, in *Davis Furniture Company,* 100 N. L. R. B. 1015, 1019, correctly noted that, in each instance where those two words are linked, a particular strike activity is proscribed as unlawful, and the specific inclusion of "lockout" in this context may well have stemmed "from a desire to emphasize even-handed justice where union activity was being restricted." We think the Board in that case was also correct in saying: "We find nothing in the Act which equates lawful strikes and lockouts. On the contrary, only the right to strike is expressly reserved by Congress in Section 13 of the Act. The absence of any similar expressed reservation of the right to lockout strongly argues against any intent to establish that right."[6]

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[6] In answering the argument that lockouts and strikes should be equated, the Board stated at 100 N. L. R. B. 1020-21, "* * * Nor is the notion correct that strikes and lockouts are 'commensurate weapons' in collective bargaining and that without the right to lockout an employer has no comparable economic weapon. Faced with an impasse in bargaining, the employer still retains control of the terms of employment so long as production continues. He is free to continue the existing terms without any contract, or, indeed, unilaterally, to institute any previously proposed changes in those terms. These courses of action are obviously not available to the union * * * Even if the employer is unable to get replacements to permit continued operation in the face of a strike, he is generally in no worse position than the strikers. Both adversaries in the conflict would in such case be under the same economic pressure to terminate the strike and restore the flow of wages and profits. We see no reason

The Board, although relying on the decision of the Ninth Circuit in *Leonard,* goes somewhat further in its reasoning. It seeks to support its new ruling in various ways: (1) Although the threat of a strike involved no peculiar economic hardship to any of the employers not on strike, nevertheless the case comes within the exceptional economic hardship category because the strike against Frontier involved the "destruction of the unitary system of bargaining." (2) Because of the previous bargaining with Exchange, a strike against one member was the equivalent of a strike against all.

The Board's position, no matter how stated, thus comes to this: (1) A union cannot be compelled to bargain in the first instance with several independent employers solely through an association of those employers; (2) however, if the union has so bargained for several years, then, by this voluntary action on its part, it becomes obligated to continue bargaining exclusively with the employer association, at least to the extent that, if it strikes against one member of the association, lockouts by the other members become lawful although the lockouts would otherwise be unlawful as unfair labor practices. Such a ruling constitutes unauthorized legislation by the Board in which we cannot acquiesce.

The Board has consistently held in the past that any employer may withdraw at will from a multi-employer bargaining unit, despite a history of

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in equity or justice to give to employers the privilege of extending the hardship and deprivations of industrial conflict to areas not directly involved, nor could such a privilege be squared with the basic policy of the statute to minimize industrial strife and interruptions to commerce."

multi-employer bargaining.[6a] Although it would seem only fair that the union be accorded the same privilege of voluntary withdrawal as is enjoyed by the employer, the Board has limited a union's right to withdraw from a multi-employer unit where there is such a history of multi-employer bargaining. In *Stouffer Corp.*, 101 N. L. R. B. 1331, the Board denied the union's petition, under §9(c) of the Act, in which the union sought to have the Board find the appropriate bargaining unit to be the employees of a single member of an employers' association rather than those of all members in the association with which the union had bargained for the preceding ten years.[7] And in *Morand*

[6a] See, *e.g.*, *Bearing & Rim Supply Co.*, 107 N. L. R. B. 101; *Association of Motion Picture Producers*, 88 N. L. R. B. 1155, 1161; *Johnson Optical Company, et al.*, 87 N. L. R. B. 539; *Air Conditioning Company of Southern California*, 81 N. L. R. B. 946, 952; *General Baking Company*, 73 N. L. R. B. 44, 47. See also Freidin. The Taft-Hartley Act and Multi-Employer Bargaining (1948) p. 16; Broderick, Representation Proceedings, University of Illinois Law Forum (1955) 223, 237-238; Note, 3 Stanford L. Rev. 510, 515.

This practice apparently was acceptable to Congress and was approved by it. See 1 Legislative History of The Labor Management Relations Act of 1947 (Government Printing Office 1948) p. 102.

[7] Our views on mutuality of treatment of unions and employers are limited to situations where, as here, an incumbent union seeks to withdraw from multi-employer bargaining and is not opposed in its claim as to the appropriate bargaining unit by another employee group. Thus we express no opinion on the desirability of Board decisions (1) refusing to let a non-incumbent union conduct a representation election in a single-employer unit where there has been a history of multi-employer bargaining and the incumbent union desires the multiple unit. See *Des Moines Packing Co.*, 106 N. L. R. B. 206; *Abbotts Dairies, Inc.*, 97 N. L. R. B. 1064; *American Writing Paper Co.*, 94 N. L. R. B. 1773; *Balaban*

Brothers Beverage Co., 91 N. L. R. B. 409, the Board, passing on a charge of unfair labor practice on the part of the union in refusing to bargain, intimated that the union must bargain to the point of an impasse with the employer association before it may validly revert to individual bargaining with each member of the association.

We see no rational basis for holding, in any context, that at any time any particular employer may, at his will, withdraw from bargaining through an employers' association of which he is a member, while a union is not equally free to discontinue bargaining through such an association with respect to any particular employer member.[8] On

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& Katz (Princess Theatre), 87 N. L. R. B. 133; *Cloth Laying Appliances Corp.*, 78 N. L. R. B. 785 (2) denying employees of a single employer a decertification election where their union has, in the past, bargained on a multi-employer basis and desires to continue doing so; *Yardley Plastics Co.*, 111 N. L. R. B. 526; *Grand Rapids Fuel Co.*, 107 N. L. R. B. 1402; (3) denying the incumbent union's request to find a single-employer unit appropriate when a non-incumbent union seeks a representation election in the multi-employer unit with which bargaining had been carried on in the past; see *Archie Bernstein, et al.*, 98 N. L. R. B. 1144; *Belle Vernon Milk Co.*, 90 N. L. R. B. 717.

The Board has indicated that it will allow a union to withdraw from a multi-employer bargaining unit and bargain on an individual basis where the members of the employer association with which the union had previously bargained, have consented, since it deems this an abandonment of multi-employer bargaining on the part of the employers. *Spalding Avery Lumber Co.*, 103 N. L. R. B. 1516; reversed on the ground that no abandonment of multi-employer bargaining had been intended by the employers, 220 F. (2d) 673 (C. A. 8).

[8] The importance of mutuality of the right to withdraw was cogently put by dissenting Commissioner Styles in *Continental Baking Company*, 99 N. L. R. B. 777, 787-789. See also Note, 3 Stanford L. Rev. 510, 519 (1952).

that account, were the issue here that of the appropriate unit in which the union must bargain—concerning which the exercise of the Board's discretion is usually accorded great weight[9]—we would be inclined to think that the Board would "abuse" its discretion in forcing a union to continue bargaining with a multi-employer unit against the union's wishes. In any event, we think that the union here met the test established by the Board in the *Morand* case, i.e., an impasse in the bargaining with the association had been reached before the Union called a strike at Frontier.[10]

The issue here, however, is not the appropriate unit for collective bargaining purposes, but whether a lawful strike against one member of Exchange justified a lockout by the other members. There was no claim here that the Union had refused to bargain; nor did the Union seek certification as representative of a unit smaller than the association-wide unit as in the *Stouffer* case, *supra*. Consequently, here the Board had no occasion to exercise its discretion to determine the appropriate bargaining unit.[11] Hence, we do not intrude on

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[9] See, *e.g.*, *Packard Motor Car Co.* v. *N. L. R. B.*, 330 U. S. 485, 491; *N. L. R. B.* v. *Hearst Publications*, 322 U. S. 111, 132-135; *N. L. R. B.* v. *National Broadcasting Co.*, 150 F. (2d) 895, 898 (C. A. 2).

[10] The Union bargained with Exchange from March, 1953 to May 26, 1953, when it called a strike at Frontier after failing to reach agreement on the terms of a new contract. The trial examiner found that there was an "impasse" in the bargaining.

[11] Section 9(b) of the Act authorizes the Board to determine the "unit appropriate for the purposes of collective bargaining." The Board exercises its power under this section in representation proceedings under §9 of the Act to determine

the exercise of the Board's discretionary power to make such a determination when we hold that the Union had a right to withdraw from the multi-employer unit by calling a strike against only one member of Exchange, at least to the extent that the calling of that strike did not render the lockout lawful.

The arguments against legalizing lockouts, merely because a multi-employer unit is involved, were set out by the Board itself in the *Morand* case, 91 N. L. R. B. 409, 412-415, where the Board said, *inter alia:* "In our opinion, the Act does not permit a discharge to reduce, by anticipatory action, the effectiveness of an expected strike by a labor organization. The Board has held, with judicial approval, that an employer's economic interest in preventing a strike does not justify him in engaging in conduct of the type proscribed by the Act. The fact that the expected strike may be so timed or so directed as to place severe economic pressure on the employer does not, in our judgment, remove the strikers from the protection of the Act. Strike activity, actual or threatened, is concerted activity, and concerted activity does not cease to be protected merely because it is, or may be, effective, or because it subjects the employer to

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the exclusive bargaining representative of the employees in the unit which the Board deems is appropriate.

The Board must also determine the appropriate unit for collective bargaining purposes when there is a charge by the union or employer that the other has committed an unfair labor practice under §8(a)(5) or (b)(3) by refusing to bargain in the appropriate unit.

Since the question of the "appropriate" unit is applicable only where the issue involves collective bargaining, it can have no relevance to strike activity by the union.

economic hardship. Any other view would not only be in derogation of the right of employees to engage in concerted activities but would also conflict with the express policy of the Act to minimize industrial strife. * * * Thus, if in the instant case we accepted the respondents' view * * *, we would be required to hold that a strike against one respondent * * * directly involving only about sixty of its employees, justified the other thirty-four respondents in discharging about seven hundred of their employees, even though they had not participated in the strike but had, in fact, remained at work. As stated in the brief filed on behalf of the General Counsel in support of the Intermediate Report: 'In this case, the effect of granting immunity to the discriminatory lockout by thirty-four employers, in reprisal against the strike against a thirty-fifth employer, would be to multiply the obstruction to commerce. It would set a sweeping precedent for the conversion of any single employer's dispute into an association-wide or industry-wide dispute. An isolated skirmish would become a civil war' * * * The logical corollary of the respondents' position is, therefore, that a union seeking to negotiate a contract with a group of employers, however large, must strike all or none. If it strikes less than all, its members will be deprived of the protection of the Act; if it strikes all, they will be protected.[12] We cannot give such an

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[12] The difficulty with which a union would be faced if it were placed in the dilemma set forth by the Board can easily be foreseen. For example, if a union representing automobile workers had once bargained collectively with a group representing all the automobile manufacturers, a subsequent strike against, say, the Ford Company would justify General Motors

incongruous construction to an Act designated to minimize industrial strife. * * * To hold that employees in a multi-employer unit who remain at work may be treated as strikers, solely because of a strike by other employees, would involve the introduction of a new concept in labor relations—i.e., the vicarious or constructive strike. We know of no legislative or other warrant for introducing such a concept."

Multi-employer bargaining has never received the express sanction of Congress. It would stretch the usual canons of interpretation unduly far to conclude that, in enacting the Taft-Hartley Act, Congress gave legislative approval to all the previous Board rulings concerning such bargaining.[13]

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in locking out its employees, regardless of the patent fact that the anticipation of a strike against General Motors would cause it no exceptional economic hardship.

Thus, if we were to accept the Board's reasoning in the instant case, in any case where there is a history of multi-employer bargaining, if the union wishes to call a strike, it must wait until it can afford to strike all the employees in the unit; for if it struck only one, the non-struck members of the association could lock out their employees.

[13] It may well be that Congress, in enacting the Taft-Hartley Act, did not intend to interfere with the then established practice of multi-employer bargaining built up by the Board under the Wagner Act. See Freidin, *supra*, pp. 17-34.

A review of the legislative history of the amendments to the Act discloses sharp disagreement over the desirability of multi-employer bargaining. The House Bill (H. R. 3020, 80th Cong. 1st Sess., §9(f)(1)) as passed would have prevented certification of multi-employers units unless they meet certain conditions. Comment was varied and oft-times sharply critical. See 1 Legislative History of the Labor Management Relations Act of 1947 (Gvt. Printing Office 1948) pp. 315, 325-327, 364, 377; 584, 612, 630, 636, 643, 653, 663, 672, 680, 716, 758-767, 772-775 867-868. Senators Taft, Ball, Donnell, and Jenner proposed to meet the problem by limit-

Even if we assume that it did, still the Board at that time had not gone to the extreme lengths to which it now seeks to go in order to maintain the "stability of the employer unit."[14] We think Congress must have intended that such a radical innovation be left open for consideration by the joint committee it set up under §402 of the Act to study, among other things, "the methods and procedures for best carrying out the collective bargaining process, with special attention to the effect of industry-wide or regional bargaining upon the national economy."

We feel the Board's action in restricting employees in the exercise of rights which Congress has expressly protected, merely to effectuate a policy as to which Congress has, as yet, expressed no clear opinion, constitutes an abuse of the Board's legitimate authority under the Act and a usurpation of the power of Congress. Neither the Board nor the courts may make so fundamental a change in the existing law as that which would result from the

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ing the unions eligible to act as representatives of those "composed solely of employees of one employer, or of employees employed in the same metropolitan district or county by different employers," and to further meet the problem by prohibiting an "international union from coercing a local union in the conduct of negotiations." *Id.* at 457; 2 Legislative History, 1217-1218. These proposals, which were not passed by the Senate, likewise elicited comment, favorable and unfavorable. *Id.* at 1217-1256, 1271-1302. Thereafter the proposals relating to multi-employer bargaining were eliminated in conference. 1 Legislative History 550-551.

[14] The cases concerning the question whether the non-struck employers in an association may lock out their employees after a strike against only one of the employer-members, were all decided after the passage of the Taft-Hartley Act of 1947.

Board's decision. The problems involved in legalizing the lockout in multi-employer situations are manifold, and their solution must be left to Congress.

Since the stipulated facts show no economic justification for the lockout, we hold that the lockout of non-striking employees constituted an interference with their statutory right to engage in concerted activity in violation of § 8(a)(1) of the Act, and also constituted discrimination in the hire and tenure of employment of the employees because of the Union's action, thereby discouraging memberships in the Union in violation of § 8(a)(3) of the Act.

The Board's order and decision dismissing the complaint must be set aside. The case is remanded to the Board for further proceedings in conformity with this opinion.

WATERMAN, *Circuit Judge* (dissenting):

The National Labor Relations Board decided in this case that the employer members of this multi-employer bargaining unit did not violate the National Labor Relations Act, 29 U.S.C.A. § 151 *et seq.*, by locking out their employees when the Union, following several weeks of unsuccessful contract negotiations with the group, engaged in a strike against one of the members in support of its demands against all. The Board concluded that the strike against one member "necessarily carried with it an implicit threat of future strike action against any or all of the other members of the

[multi-employer bargaining unit.]"[1] In these circumstances, and "in the absence of any independent evidence of anti-union motivation," the Board viewed the lockout as "defensive and privileged in nature, rather than retaliatory and unlawful" since it was a necessary means of protecting "the employer solidarity which is the fundamental aim of the multi-employer bargaining relationship."

I think that the decision of the Board, which accords with the views of the three Courts of Appeals that have thus far had occasion to consider the problem,[2] is a reasonable and proper construction of the Act. For the reasons set forth below, I would affirm the Board's order dismissing the Union's complaint.

1. *Not every employer interference with a legitimate concerted activity is proscribed by the Act.* Thus, an employer is permitted to replace economic strikers, even though this amounts to a limitation on free exercise of the right to strike. *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333. Similarly, where special "economic or operative" problems are presented, an employer may counter a

[1] My colleagues accept this conclusion of the Board, holding that the Board reasonably inferred a threat of strike against the non-struck employers. The only important difference between the facts in this case and those in *Leonard* v. *N. L. R. B.*, 9 Cir., 197 F. 2d 435, 205 F. 2d 355, is that here the Union did not make a public announcement of its intentions.

[2] *Leonard* v. *N. L. R. B.*, 9 Cir., 197 F. 2d 435, 205 F. 2d 355; *Morand Bros. Beverage Co.* v. *N. L. R. B.*, 7 Cir., 190 F. 2d 576, 582; *N. L. R. B.* v. *Continental Baking Co.*, 8 Cir., 221 F. 2d 427, 431-432; *N. L. R. B.* v. *Spalding Avery Lumber Co.*, 8 Cir., 220 F. 2d 673, 675.

strike threat with an anticipatory lockout. *Duluth Bottling Association,* 48 N.L.R.B. 1335 (spoilage of materials); *International Shoe Co.,* 93 N.L.R.B. 907 (interruption of production); and *Betts Cadillac Olds, Inc.,* 96 N.L.R.B. 268 (inability to finish repair work). In short, where the right to strike collides with legitimate employer interests, the Act leaves to the Board the task of "working out an adjustment." *Republic Aviation Corp.* v. *N.L.R.B.,* 324 U.S. 793, at 797-798.

2. *The employers in a multi-employer bargaining unit have a legitimate and vital interest in the continuance of the established unitary system of bargaining.* In this case the eight members of the Exchange are linen supply businesses competing with each other within the Buffalo metropolitan area, and the Union represents the drivers of all Exchange members. The joinder of the employers for purposes of bargaining as a unit with the Union in such circumstances presents a familiar pattern in industrial relations.[3] It allows small employers to bargain on an equal basis with a powerful, industry-wide union, and at the same time avoids the competitive disadvantages resulting from non-uniform contractual terms.[4]

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[3] The Board, in its brief, citing Monthly Labor Review, vol. 64, pp. 398, 409 (1947), says that in 1947 there were over 5,000 multi-employer units covering some 4,000,000 employees.

[4] See, *e.g.*, Freiden, The Taft-Hartley Act and Multi-Employer Bargaining Univ. of Pennsylvania Press, 1948), p. 5; Garrett and Tripp, Management Problems Implicit in Multi-Employer Bargaining (Univ. of Pennsylvania Press, 1949), pp. 2-3; Kerr and Fisher, Multiple-Employer Bargaining: The San Francisco Experience (Univ. of California Press,

3. *The Board's accommodation of the legitimate interest of the employers in group bargaining and the right of the employees to strike in support of their demands is a reasonable and proper one.* Group bargaining benefits the union and the public as well as the employers. The union minimizes its organizational and administrative expenses; it can more readily standardize wages and other conditions of employment; and it gains security against raiding by other labor organizations.[5] Moreover, insofar as the public is concerned, the experience of the Board and many other specialists in the labor field has shown that strikes within these units tend to be infrequent, and that there is more likely to be full acceptance on both sides of the principle of resolving differences through negotiation.[6] In my judgment the decision from which I am dissenting would tend to undermine these beneficent developments and to convert industrial relations into a pattern of continuous piecemeal strife.

The Board argues that the purposes of multi-employer bargaining are to create uniform terms

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1948), pp. 27-30; Hall, Impact of the Bargaining Unit on Labor Management Relations (Second Annual Conference on Labor, N. Y. U., 1949), pp. 39-40.

[5] Kerr and Randall, Multiple-Employer Bargaining in the Pacific Coast Pulp and Paper Industry (Univ. of Pennsylvania Press, 1948), p. 9; Hall, *op. cit.* note 4 *supra*, pp. 43-44.

[6] Hall, *op. cit.* note 4 *supra*, p. 44; Kerr and Fisher, *op. cit.* note 4 *supra*, p. 40; Kerr and Randall, *op. cit.* note 5 *supra*; pp. 27-31; Bahrs, The San Francisco Employers' Council (Univ. of Pennsylvania Press, 1948), pp. 37-39; MacDonald, Bob and Sheifer, Labor Relations in Milk Distribution in the New York Metropolitan Area (Matthew Bender & Co., 1951), pp. 575-577; Hill, Teamsters and Transportation (Am. Council on Public Affairs, 1942), p. 202; Note, 65 Harv. L. Rev. 353, 355.

and conditions of employment at the plants of all employers in the unit, and to achieve on a case-by-case basis an approximate balance of power between organized labor and organized management. From the employers' point of view, the Board says, the major advantage of multi-employer bargaining is that it may give the employers sufficient bargaining power to withstand the divisive pressures of whipsawing. When a union representing all of the employees of a multi-employer group engages in a strike against one of the members of the group, even while pretending to bargain with the group as a whole, it is directly attacking an important interest of all the employers in the group—their interest in group bargaining. The Board feels that the multi-employer bargaining unit will not long survive if the nonstruck members are not permitted under such circumstances to use their countervailing force against the Union. I think we should accept the experienced judgment of the Board on such matters. The present decision will tend to destroy the equality of bargaining power and reduced incidence of strikes which have been the hallmarks of multi-employer bargaining.

Moreover, I agree with the Board that the decision of the Court will permit the Union to keep the benefits which it has derived from multi-employer bargaining, while at the same time nullifying the consideration that made such unit desirable from the employers' standpoint. That is to say that both sides gain certain benefits and accept certain restrictions when they agree to engage in multi-employer bargaining. The union

gains important organizational, raiding and standardization advantages, while the employers gain a protection against whipsawing. This decision would deprive employers of this *quid pro quo*. The Union is enabled to strike the employers one at a time without running the deterrent risks of a unit-wide strike.[7] In this situation, "the right of the employers to lock out temporarily all the employees is no more than equal to the right of the union of all the employees to call out the employees of one after another of the [employers] in the whipsawing manner above described." *Leonard* v. *N. L. R. B.*, 9 Cir., 205 F. 2d 355, 357-358.

4. *There is nothing in the Act or in its legislative history which deprives the Board of power to adjust the conflicting but legitimate interests of employers and employees in this situation.* The Act protects the rights of employees to strike in support of their demands, but this protection is not absolute. It is well settled that employers are not guilty of unfair labor practices when they act in protection of legitimate and vital interests of their own, even though such acts necessarily impinge on the concerted activity of employees. The Act is not a detailed blueprint, but a general guide; and it is

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[7] The majority decision relies heavily on the idea that the Union should be accorded the same freedom of voluntary withdrawal from a multi-employer bargaining unit as the Board has accorded to individual employers. This may be so, but in this case the Union did not seek to withdraw from the unit. It attempted to retain the advantages of group bargaining by pretending to bargain with the multi-employer group, while at the same time taking strike action against one of the members of the group.

the function of the Board to adjust the conflicting interests of employers and employees.[8]

Multi-employer bargaining is almost as old as the Act itself. The Board has established many multi-employer bargaining units pursuant to 29 U. S. C. A. §159(b), and, when established, employers and unions have the reciprocal duty to bargain in that group. 29 U. S. C. A. §158(a)(5) and (b)(3). Efforts to limit or destroy multi-employer bargaining were made in 1947, but the amended Act (the Taft-Hartley Act) left multi-employer bargaining undisturbed. I do not think it is properly inferable that Congress, by its inaction, meant to leave the question of multi-employer bargaining to be dealt with in future legislation. On the contrary, considering the long

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[8] "A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application. There is an area plainly covered by the language of the Act and an area no less plainly without it. But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review. Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy. On the other hand, the power with which Congress invested the Board implies responsibility—the responsibility of exercising its judgment in employing the statutory powers." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194.

history of multi-employer units, it seems more reasonable that Congress intended that the Board should continue its established administrative practice of certifying multi-employer units, and intended to leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future.

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 23424

TRUCK DRIVERS LOCAL UNION NO. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A.F. OF L., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

DECREE

Before: Clark, Frank and Waterman, Circuit Judges

This cause came on to be heard upon the petition of Truck Drivers Local Union No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL to review an order of the National Labor Relations Board dated July 26, 1954. The Court heard argument of respective counsel on October 14, 1955, and on February 14, 1956, being fully advised in

the premises, handed down its decision setting aside the Board's order and remanding the case to the Board. In conformity therewith, it is hereby

ORDERED, ADJUDGED, AND DECREED that the Board's order of July 26, 1954 be and it hereby is set aside and remanded to the Board for further proceedings in conformity with the Court's opinion.

(S.) JEROME N. FRANK,
Judge, United States Court of Appeals for the Second Circuit.
(S.) STERRY R. WATERMAN,
Judge, United States Court of Appeals for the Second Circuit.

FILED: March 13, 1956

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition

of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8 (a) It shall be unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

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